Supreme Court, U.S.
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No. 01-1865

In The

Supreme Court of the United States

MEREDITH ODEN,

Petitioner,

v.

NORTHERN MARIANAS COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' unanimous decision affirming the district court should be set aside because one member of the panel was not an Article III judge.

JURISDICTION

The court of appeals entered its judgment on March 22, 2002. Petitioner did not file a petition for rehearing. The petition for a writ of certiorari was filed June 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the statement of facts in the opinion below, 284 F.3d 1058, 1059-1060, reproduced in Pet. App. 2a-6a.

REASONS FOR DENYING THE WRIT

Petitioner urges the Court to grant the writ based upon her contention that "[t]he Ninth Circuit panel hearing Oden's appeal was not properly constituted, having not been entirely composed of Article III judges." Cert. Pet. at 5. The Court should deny certiorari for the following reasons.

1. In her petition for certiorari, petitioner challenges the composition of the panel for the first time. Petitioner failed to object to the presence of a single non-Article III judge on her panel before, during, or after oral argument in the court of appeals. Petitioner never requested a rehearing or a rehearing en banc. The Court ordinarily "[does] not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511, 514 (2001). *See also Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide

questions neither raised nor resolved below"); *TRW Inc. v. Andrews*, 122 S.Ct. 441, 451 (2001) ("We do not reach this issue because it was not raised or briefed below").

2. Failure to object to the make-up of the panel before the court of appeals constitutes a waiver of any right to a panel composed of three Article III judges. *Cf. Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver"). *See also Belom v. National Futures Association,* 284 F.3d 795, 799 (7th Cir. 2002) (relying on *Commodity Futures Trading Commission*, 478 U.S. at 848) ("The right to an Article III forum is not absolute and may be waived"); *United States v. Desir*, 273 F.3d 39, 44 (1st Cir. 2001) (Defendant's failure to object to magistrate's presiding over voir dire waives constitutional entitlement to an Article III judge at jury impanelment).

3. Petitioner has not identified any conflict among the circuits on the question presented, nor is respondent aware of any. Petitioner cannot argue with confidence that another court would reach a different result given the same circumstances.

4. Assuming petitioner's claim has not been waived, the decision below was consistent with the decisions rendered by this Court.

Initially, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), Article III does not apply in the territories. *Id.* at 544 (relying on *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828) (Marshall, C.J.). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (Only "fundamental" constitutional rights, such as those embodied in the Fifth and Sixth Amendments, are guaranteed to

inhabitants of the territories); *Reid v. Covert*, 354 U.S. 1, 13 (1957) (Although "fundamental" constitutional rights apply everywhere, the Court determined in the Insular Cases that certain constitutional safeguards were not applicable to the territories). Therefore, "in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies." *Glidden Co.*, 370 U.S. at 545.

Furthermore, it is well settled "that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public." *McDowell v. United States*, 159 U.S. 596, 602 (1895). *See also Ryder v. United States,* 515 U.S. 177, 180 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under color of official title even though it is later discovered that the legality of that person's appointment . . . to office is deficient"). At the very least, the non-Article III judge participating on the panel was acting in a *de facto* capacity. Accordingly, the decision rendered by the court of appeals is valid.

Finally, honoring the court of appeals' decision is consistent with this Court's long-standing precedent of tolerating decisions from lower courts that are less than letter-perfect. In *Keene v. McDonough*, 33 U.S. 308, 310 (1834), the Court considered a challenge to the adjudication of a Spanish tribunal made after the cession of the country to the United States. Because it had jurisdiction of the case and rendered its decision while the country was, de facto, in the possession of Spain and subject to Spanish

laws, the decision of the Spanish tribunal was valid. *Id.* Furthermore, when the Court of Appeals for the Second Circuit was composed of one Supreme Court justice and one district court judge, the death of the Supreme Court justice did not deprive the surviving district court judge from sitting alone as the circuit court. *Pollard v. Dwight*, 8 U.S. 421, 429 (1808) (Marshall, C.J.). The circuit consisted of two judges, any one of whom was capable of performing judicial duties. *Id.* More recently, the Court held that while judges sitting on the Court of Claims and the Court of Customs and Patent Appeals have specialized functions, this does not deprive them of the capacity to sit in judgment upon the staple business of the District Courts and Courts of Appeals. *Glidden Company v. Zdanok*, 370 U.S. 530, 584 (1962).

Although the challenged panel member was not an Article III judge, his court exercises the same jurisdiction as a United States District Court. *See* 48 U.S.C. § 1424(b). *See also Schenck v. Government of Guam,* 609 F.2d 387, 390 (9th Cir. 1979) (Guam's District Court has original and exclusive jurisdiction of all cases arising under the constitution, treaties and laws of the United States.) In addition, petitioner's appeal was heard and decided by two eminently qualified Article III judges. Chief Judge Schroeder has sat on the court of appeals since 1979. Senior Judge Goodwin was appointed to the Ninth Circuit in 1971. Both agreed that the lower court properly granted summary judgment to respondent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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